

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Jacqueline Scott Corley, Magistrate Judge

IN RE: FACEBOOK, INC.)
CONSUMER PRIVACY USER) **NO. 18-MD-02843 VC (JSC)**
PROFILE LITIGATION.)
)
)

San Francisco, California
Friday, January 15, 2021

TRANSCRIPT OF REMOTE ZOOM VIDEO CONFERENCE PROCEEDINGS

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Friday, January 15, 2021

8:30 a.m.

P R O C E E D I N G S

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THE CLERK: Court is now in session. The Honorable Jacqueline Scott Corley presiding.

Calling Civil Action 18-MD-2843, In Re: Facebook, Inc. Consumer Privacy User Profile.

Counsel, starting with plaintiffs, can you please state your appearance.

MS. WEAVER: Good morning. It's Lesley Weaver of Bleichmar, Fonti & Auld. And today with me I have Anne Davis, Matt Montgomery, and Angelica Ornelas.

MR. LOESER: Good morning, Your Honor. Derek Loeser from Keller Rohrbach with Cari Laufenberg and David Ko and Chris Springer, also from Keller Rohrbach.

MS. STEIN: Good morning, Your Honor. Deborah Stein for Facebook from Gibson Dunn. I'm here with Josh Lipshutz, Russ Falconer, and Martie Kutscher.

THE COURT: Good morning.

Okay. Just so you know, I have a criminal matter at 9:00; so we're going to hit sort of the high points.

Let's start with the ADI because, as I understood it, this was sort of different from the other privilege log because Facebook has taken the position that because all these documents, interviews -- I don't know what the ADI is -- were

1 created as part of a lawyer-directed investigation, they're
2 privileged.

3 So I don't -- I don't think it's premature in the sense
4 now that you've gone through the stip, the process that the
5 parties agreed to, you were able to narrow it down. I think
6 now is the time to -- and plaintiffs have focused on, I guess,
7 their e-mails or memos, or whatever it would be, in which
8 there's no attorney on the string, on that. And so I think
9 that's ripe to go forward.

10 I don't know what meeting and conferring will do. As you
11 explained, you put very detailed explanations of why it's
12 privileged. Either they don't believe you or, what's often the
13 case, they want confirmation. Right? So that's why we'll do
14 some samples.

15 So what I was going to suggest -- sometimes when we do
16 these, if the parties need guidance, including the party
17 claiming they're privileged, I let each side pick any number.
18 I don't see why Facebook should maybe pick any. It really
19 should be I just think plaintiff. I was going to say pick 20.

20 And then let's just get simultaneous briefs because, while
21 I do this all the time, I know with respect to investigations,
22 it'd be nice to bring me up to speed on the state of the law
23 with respect to that and privilege. And then I'll review them.

24 So that would be my proposal.

25 **MS. STEIN:** All right. Thank you, Your Honor.

1 I think the issue here is that while this exercise started
2 as, you know, what I think was intended by plaintiffs to be
3 some sort of categorical challenge to investigate -- to an
4 investigation, the way this has played out in the privilege log
5 is that we've logged about 6,000 entries. Plaintiffs have said
6 they want to challenge anything that doesn't have a lawyer on
7 it. But the logs look very much like you would expect an
8 ordinary privilege log to look like, where the entries that
9 they're challenging facially say things like, you know, "E-mail
10 revealing advice from Gibson Dunn concerning the structure of a
11 legal investigation," you know, things like that; "E-mail
12 summarizing advice from Gibson Dunn" or from someone from
13 Facebook in-house counsel. So it's not necessarily something
14 that is any different than you would ordinarily see.

15 And we feel that plaintiffs haven't -- are just saying:
16 We want to challenge everything. But there really isn't a
17 rhyme or reason that connects it to how this started out as a
18 challenge to whether this investigation was privileged.

19 **THE COURT:** Well, they've now challenged 400 out of
20 6,000. So that's good. That's narrowed -- right? --
21 considerably.

22 And I think whenever there's not a lawyer on it --
23 right? -- that's always more on the edges. That's more on the
24 edges. So I think that the showing sufficient to allow the
25 *in camera* review is there. I feel more comfortable when I have

1 it in context and I can see it. That's why I say just do a
2 sample, and then that should be the end of the matter.

3 **MS. KUTSCHER CLARK:** Your Honor, if I can add to that,
4 I think a concern we have about jumping directly into briefing,
5 particularly if the briefing is going to be simultaneous, is we
6 don't actually really know what we're briefing at this point.
7 We don't know what plaintiffs' position is. We don't know why
8 they think these particular documents are not privileged.

9 Each one of these documents, the way they're logged --
10 and, you know, we've looked at them carefully -- they're
11 summarizing legal advice; they're conveying legal advice. This
12 isn't -- you know, we're not standing on a work
13 product assertion.

14 **THE COURT:** No, no. But it's your burden. It's your
15 burden; so you know what to brief. Whatever it is that meets
16 your burden. Right? It's your burden. It's not their burden.
17 It's your burden to show that they're privileged. So --

18 **MS. STEIN:** Yes, Your Honor. And --

19 **THE COURT:** -- whatever the case law is, whatever it
20 is that says just because an attorney isn't -- which you did a
21 little bit -- isn't on the string doesn't mean, if it's
22 conveying legal advice -- it shouldn't be very long.

23 **MS. STEIN:** So just for clarity, Your Honor, is what
24 you're asking for for briefing where plaintiffs challenge
25 certain entries, they pick certain entries that they want to

1 challenge; we respond why we believe our log has made the
2 showing that we're entitled to show; and then Your Honor will
3 decide who's right on the law and decide which ones, if any,
4 you're going to review *in camera*?

5 **THE COURT:** Well, I think I'll just review them all
6 *in camera* with the briefs and then decide: Yes, the privilege
7 was appropriately invoked.

8 And then that should be the end of the matter. Right? I
9 don't then expect -- if, let's say, all 20 I believe were
10 properly invoked, that should be the end of the matter because
11 plaintiff should really be picking the 20 out of the 400 that
12 they feel most strongly might not be privileged. Right? So
13 it's sort of an exemplar in that state.

14 If I don't agree, well, then it becomes more complicated.
15 Right?

16 **MS. STEIN:** Right. I guess sort of a parallel
17 question is that, because this is in the context of an
18 investigation, I suspect we may want to provide supporting
19 information. You may not be able to tell, Your Honor, from the
20 face -- some of the documents, I think you will be able to see
21 that it's revealing direct attorney communications or whatnot.
22 Others may be something that was at the direction of counsel
23 which may require context.

24 **THE COURT:** But isn't that on the log that you already
25 provided to them, or did you just say -- I don't think you

1 attached -- did you just say "Direction of counsel" with
2 identifying the counsel or...

3 **MS. STEIN:** I think it depends on the entry,
4 Your Honor. But given that this was an attorney-driven
5 investigation, I would -- I just don't know what kind of
6 additional information Your Honor might want for us to support
7 that aspect.

8 **THE COURT:** Whatever you think meets your burden,
9 that's all.

10 **MS. STEIN:** Thank you.

11 **THE COURT:** Whatever you think you need, or maybe more
12 than you think you need, to meet your burden. Right?

13 **MR. KO:** Your Honor, this is David Ko on behalf of
14 plaintiffs.

15 And thank you for that. I think that's what we've been
16 wanting to do, quite frankly, since last spring and summer, to
17 give you --

18 **THE COURT:** I'm going to stop you, Mr. Ko.

19 **MR. KO:** Okay.

20 **THE COURT:** You should retract the last thing you
21 said. Not productive. Not helpful. Okay?

22 **MR. KO:** Sounds good. Scratch that from the record.
23 I fulfill my New Year's resolution.

24 But let me ask for some context -- or some clarification
25 on the 20, because with respect to the 400 entries that we have

1 identified to Facebook, those include both parent documents and
2 attachments.

3 So our assumption would be the 20 -- the 20, you know,
4 exemplars that we propose to you would be both -- you know, one
5 document or one communication would be both the parent and the
6 attachment or attachments. So --

7 **THE COURT:** Yeah. There were 400 entries. So 20
8 entries.

9 **MR. KO:** Well, I guess that's what I was hoping to get
10 clarification on, Your Honor, because the 400 comprises
11 documents that reflect both the parent and the underlying
12 attachments.

13 **THE COURT:** You mean a single entry would comprise
14 both?

15 **MR. KO:** Well, no. There would -- for example, there
16 could be seven entries that relate to one document.

17 So the way that Facebook has logged these materials, they
18 include -- for example, if there's an e-mail and then a
19 diagram, you know, they claim that there's a diagram that was
20 attached to the e-mail that is also privileged. And then
21 there's also another attachment -- because oftentimes in
22 e-mails we attach one or more attachments -- and then there's a
23 spreadsheet. So what they've done is they've separately logged
24 those. So --

25 **THE COURT:** That's okay. 20 entries.

1 And look, if it turns out one of the entries involving an
2 e-mail, I say, "Oh, not privileged," well, then you're going to
3 have a discussion anyway; and maybe something then that was
4 attached, if it's not in your 20, we'll have a discussion
5 about.

6 Just 20 entries.

7 **MR. KO:** Understood. Thank you, Your Honor.

8 **MR. MONTGOMERY:** Okay. Your Honor, before we move on,
9 quick question.

10 How long do you want the briefs?

11 **THE COURT:** I don't think they should be long. I
12 mean, I'm thinking, like, ten pages. But you tell me because
13 it's -- I don't know.

14 **MS. WEAVER:** Ten pages is fine. We can do that. And
15 when would you --

16 **THE COURT:** Well, let me ask Facebook because it is
17 their burden.

18 **MS. STEIN:** Thank you, Your Honor.

19 I think it's -- because we don't necessarily know what's
20 being challenged, it's a little bit up in the air. I think
21 we'll probably need more than ten pages for 20 documents
22 because we may need to provide --

23 **THE COURT:** Okay. So one page -- no more than one
24 page per document. I don't mean -- just 20 total. Right? You
25 can divide it up any way you want among the 20 entries, but 20

1 total.

2 **MS. WEAVER:** Your Honor, the one thing I would ask --

3 **THE COURT:** Yeah.

4 **MS. WEAVER:** -- is that if we are -- if they are
5 putting in declarations that we're seeing for the first time,
6 plaintiffs would like an opportunity to respond to any new
7 information that's provided.

8 I mean, to your point --

9 **THE COURT:** I don't want declarations. I don't want
10 declarations.

11 **MS. WEAVER:** Okay.

12 **THE COURT:** I want the log of the entries. I want
13 what was logged for the entries. And then I want briefs, like
14 the argument.

15 **MS. WEAVER:** Okay.

16 **THE COURT:** No declarations.

17 **MR. MONTGOMERY:** Okay.

18 **THE COURT:** I want to make this simple. If we need
19 more, then we can get more at the time.

20 **MR. MONTGOMERY:** Last question, I promise, on ADI.

21 We proposed filing our brief on January 29th. Is that
22 still a deadline the Court wants us to hold to?

23 **THE COURT:** Well, that seems a little soon. I don't
24 know. When are you going to identify -- when are the
25 plaintiffs going to identify the 20?

1 **MR. MONTGOMERY:** We could do it within seven days; so
2 by next Friday.

3 **THE COURT:** Okay. So that would be the 22nd. So
4 I think a brief by the 29th might be a little -- how about the
5 5th? Does that work, Ms. Stein?

6 **MS. STEIN:** For plaintiffs to submit an opening brief
7 on the 5th?

8 **THE COURT:** No. I thought we were just going to have
9 simultaneous briefs.

10 **MS. STEIN:** I think that's going to be a little bit
11 fast for us, Your Honor, if we've just found out what the
12 entries are.

13 **THE COURT:** That's two weeks. Well, no, because you
14 already logged them. Right? It's merely putting down into
15 more paper the analysis that's already been done because
16 they've already been logged.

17 I mean, and also, I thought this was going on in other
18 cases and this is not new or -- ADI. I mean, we've known this
19 is at issue. You know. You have your argument as to why
20 they're privileged. I assume somewhere in a file, virtual,
21 there's a memo, quite thorough, with all the law and anything.
22 It just needs to be turned into a brief.

23 So I think the 5th would be fine. That's two weeks.

24 But if you can identify, Mr. Montgomery, before the 22nd,
25 that would be helpful.

1 **MR. MONTGOMERY:** We will try to do so, Your Honor.

2 **THE COURT:** I mean, same thing. It shouldn't take --
3 I mean, you've had those. You've analyzed them. It's the 400
4 to the 20.

5 Okay. All right. So that takes care of the ADI.

6 And then I'll have argument if I need it. If I need
7 something more, I will. I promise. I don't want to make a
8 decision that I'm not comfortable with.

9 Okay. So the 30(b)(6) deponent, so I did read the notice
10 and Facebook's letter. And then now plaintiff has another
11 proposal -- I guess you're -- I don't know, Ms. Stein, you seem
12 to be the lead today -- just more generally.

13 I mean, the idea was -- right? We went through this whole
14 exercise about the scope of discovery. Long, long months. And
15 then Facebook was saying: Well, actually, we've already
16 produced everything within that scope. And so that's sort of
17 like, let's just cut to it. Right?

18 And so what about plaintiffs' proposal in the statement
19 now, just those three topics, which is essentially the topic:
20 What is it that you -- what information do you gather about
21 users? What do you do with it?

22 **MS. STEIN:** Well, Your Honor --

23 **THE COURT:** And how do you monetize it?

24 **MS. STEIN:** -- that's what we endeavored to do in the
25 letter that we sent plaintiffs, was to take those three topics

1 and put some more meat on the bones of what we would be
2 preparing a witness on, because the topics, as Your Honor
3 proposed, which really is exactly what our letter fleshes
4 out --

5 **THE COURT:** Well, except this. I don't mean to
6 interrupt you, because we're done at 9:00. Except that your
7 letter is more like a topic and a directive. Right? "Data was
8 not sold." It's sort of almost like a directive to the witness
9 will testify.

10 No. The witness will testify as to what the witness
11 knows. And that may be what you believe, but that's not the
12 topic, that data was not sold. The topic is: How do they
13 monetize it? wherever that may lead. It may lead that the data
14 was not sold. Right?

15 But the problem I had with the letter was it jumped to the
16 conclusion as to -- not the topic, as to what it was going to
17 be, almost like a directive.

18 But if you take what plaintiff says and yours and you take
19 out the directives, then I think that's -- then you are on the
20 same page.

21 **MS. STEIN:** Yes. Your Honor, I don't think we were
22 intending to direct a witness on anything. I think what we
23 were trying to do was explain, you know, more -- in more
24 particularity what a witness -- the subjects within this that a
25 witness was going to be focused on, because we obviously need

1 to be able to prepare witnesses -- one or more witnesses to
2 meaningfully testify.

3 And the topics, just the three big categories could go in
4 a lot of different places. And I think the fact that
5 plaintiffs' notice looks different from what we thought this
6 was is a good reason for that.

7 So, I mean, we certainly didn't intend to be suggesting
8 that we were directing a witness to testify --

9 **THE COURT:** Well, I'm just looking at Topic 4, how
10 Facebook monetized user data. First, data was not sold.

11 No, that's not the topic. That's not what their question
12 is. Their question is: How did they monetize it? wherever it
13 may lead.

14 And a lot of this is coming from because you guys have
15 made representations, all in good faith, all what you've been
16 told. Right? And so now it's like, okay, where is it coming
17 from?

18 So I don't even know, actually -- this is just sort of a
19 preliminary initial "Let's get started," because we seem to
20 be -- like, I just couldn't figure out how to break through all
21 this stuff.

22 **MS. STEIN:** Sure.

23 **THE COURT:** So I don't even know that the -- and if
24 the witness is asked something they can't answer, then they
25 can't answer. Right? That's okay. Then we know. Like, it's

1 exploratory in that sense. So --

2 **MS. STEIN:** Right. We --

3 **MR. LOESER:** Your Honor --

4 **MS. STEIN:** -- just wanted -- we just wanted to make
5 sure, Your Honor, what we were trying to avoid for any
6 30(b)(6). We have an obligation to prepare, and we want to
7 make sure that everyone's on the same page and we get there and
8 we don't spend the day fighting about the scope of the
9 deposition.

10 So what we were trying to do in our letter was really just
11 say: Hey, here's what we're prepping the witness on, the
12 subjects. Here's how we understand it. You know, if there's
13 some disagreement on this, if we're missing something, let us
14 know.

15 We do not expect -- we don't want this to be a directive,
16 Your Honor. You know, that's not the intention. It was sort
17 of more of a blueprint of how we were going to be focusing,
18 you know, with our client on what questions needed to be
19 answered, but, you know, certainly not a directive.

20 **MR. LOESER:** Your Honor?

21 **THE COURT:** Yes.

22 **MR. LOESER:** Derek Loeser. If I could be heard for a
23 moment.

24 This topic -- you know, there's no sense talking about the
25 past. I know Your Honor isn't interested in it. So I'll just

1 try and be practical here.

2 We have an order. The order indicates what the subjects
3 are. You issued another order indicating that there needed to
4 be a 30(b)(6) notice. We took the three topics that were the
5 subject of Discovery Order Number 9 and we reduced them to very
6 concrete, very specific topics. They track directly to the
7 order.

8 **THE COURT:** You mean, you're talking about your
9 notice, or are you talking about what's in your CMC statement?

10 **MR. LOESER:** I'm talking about our notice and why
11 we --

12 **THE COURT:** Okay. I don't want to talk about your
13 notice. That was way beyond what I had in mind too.

14 **MR. LOESER:** Okay.

15 **THE COURT:** That was way beyond what I had in mind.
16 So I don't want to talk about your notice.

17 Because you put something in your CMC statement. I want
18 to talk about that --

19 **MR. LOESER:** Okay. What we put in our --

20 **THE COURT:** -- what you put in your CMC statement.

21 **MR. LOESER:** Right. What we put in our statement was:
22 We're happy to go back to just having a deposition that is
23 defined by those three topics. But what we'd like to avoid is
24 having a deposition in which most of the deposition is spent
25 fighting with Facebook about whether we get to ask all of the

1 questions we want to about those three topics. And so --

2 **THE COURT:** You can ask. They may not be able to
3 answer. So it would be best to spend your time on what the
4 witness is able to answer.

5 **MR. LOESER:** And --

6 **THE COURT:** This is not -- it doesn't come up against
7 anything or anything like that. It's like an exploratory --
8 frankly, I wish I could be there and ask the questions because
9 I want to know.

10 **MR. LOESER:** Well, Your Honor, you are --

11 **MS. WEAVER:** We wouldn't mind, Your Honor.

12 **MR. LOESER:** -- invited.

13 **THE COURT:** I'm not. But I will --

14 **MR. LOESER:** You are welcome.

15 **THE COURT:** I'm not. You can hire a special master
16 for that, if you want.

17 **MR. LOESER:** I guess here's what I'm trying --

18 **MS. KUTSCHER CLARK:** Your Honor, I --

19 **MR. LOESER:** We have a letter from them, which is like
20 a bit of a maze, and it says what is and is not going to be the
21 subject of this testimony.

22 I disagree and we all on the plaintiff side wholeheartedly
23 disagree with the various and many and confusing limitations
24 their letter describes.

25 If what that letter indicates is that when we go to the

1 deposition, those are the objections that they're going to make
2 and they're going to follow the roadmap that they have put in
3 their letter about what they're not going to allow the witness
4 to testify to, I think that that would be -- it's highly
5 inefficient. Also, it would just be completely inappropriate,
6 given the scope of the -- just the general three topics that
7 the witness is supposed to be testifying about. That's kind of
8 the practical problem that we see.

9 And we're happy to go ahead and go take the deposition,
10 but I fear that what we're going to get is, where they've set
11 forth in this detailed letter this path, this narrow path that
12 they want this witness to travel, it's just going to be a huge
13 problem because the path has nothing to do with the areas that
14 we're entitled to take discovery.

15 **THE COURT:** The problem is, we're never going to get
16 to that depo if I leave it to you all just to negotiate the
17 scope. We're never. It'll be five months from now until it
18 gets there. It just needs to get started and get there.

19 I mean, maybe -- I think the place to start, actually, is
20 for Facebook to identify: Here's the general topics.

21 I mean, they're not -- it shouldn't -- it's not -- this is
22 pretty basic stuff in some sense. Right? This is to get at
23 the basic. Like, one of the main questions is user data, what
24 is collected and what is done with it. Right? That's it.
25 That's it.

1 And so there have been representations that have been made
2 that the stuff that's been produced is all. So there are
3 people there.

4 So, Facebook, identify to plaintiffs who's going to be the
5 deponent. Right?

6 That'll then let you know somewhat what that person knows
7 or doesn't know. And then the same thing with the
8 monetization.

9 I think that's a start, and then you go and we'll see what
10 we get. And if you don't get what I think you should get, no
11 one's going anywhere; we can come back and do it again. This
12 is just to try to break through that logjam and get started.

13 **MR. LOESER:** I hear that, Your Honor, and I appreciate
14 that. And obviously, we will jump right in and try and do
15 that. I think Facebook obviously understands that this is a
16 witness that's supposed to be prepared to testify, and so
17 hopefully the witness comes prepared to testify about the full
18 range of topics that these issues relate to.

19 **THE COURT:** Well, that's what Ms. Stein said. That's
20 why she sent the letter, because they understand that they have
21 to prepare the witness to testify.

22 **MR. LOESER:** But --

23 **MS. STEIN:** That's exactly --

24 **MR. LOESER:** -- I mean, I don't want to bore -- you
25 know, I'm sorry to -- we can move on; but what the letter says

1 is what they're going to prepare the witness to testify about.

2 **THE COURT:** That's what I said. Isn't that what I
3 said at the beginning? That's what I said. They heard it.
4 I'm confident that they heard it, that that's not going -- that
5 that's not going to happen.

6 For example, it can't be -- I'll give you an example.

7 Well, did you gather this type of -- did you gather this
8 type of information about users?

9 No. The witness can't answer that because that
10 information wasn't shared.

11 Right?

12 **MR. LOESER:** Okay.

13 **THE COURT:** That's a different question. The question
14 is what did they gather, and then what was shared.

15 **MS. STEIN:** Right.

16 **THE COURT:** Whether it was shared or not. Right?

17 Ms. Stein is shaking --

18 **MS. STEIN:** Right.

19 **THE COURT:** -- her head "yes."

20 We're all --

21 **MS. STEIN:** Right.

22 **THE COURT:** -- on the same --

23 **MR. LOESER:** Right. And so --

24 **MS. STEIN:** We understand --

25 **MR. LOESER:** -- by the same --

1 **MS. STEIN:** -- that, and that was what our letter was
2 intended to communicate, that they would get to ask questions
3 about the scope of what was collected and then they would
4 narrow it down to find out what was shared or accessed.

5 But Mr. Loeser identified our concern, Your Honor, is that
6 they're primed to say that our witness isn't prepared. And we
7 really -- we take this seriously. It's important. We know
8 it's binding on the company. And so we want to do the best
9 that we can to, you know, make everyone happy here.

10 You know, we will take Your Honor's topics. Our letter
11 should not be viewed as a directive. If there's something that
12 plaintiffs looked at and think is missing, you know, we should
13 discuss that before the depositions so that we know and we can
14 make sure the witness is prepared.

15 But we were trying to cover the -- in doing this letter,
16 we were trying to cover the landscape of everything. And,
17 you know, I'm sorry some of it sounded like a directive. We
18 were just really trying to flesh out what we thought this
19 meant. And the categories of things that we listed of what was
20 collected, we think that's everything. So we were just really
21 trying to be comprehensive here so that we were all on the same
22 page.

23 **THE COURT:** So, Mr. Loeser, if you look at the topics
24 from their letter, as opposed to what's underneath, does that
25 cover -- I think that covers everything.

1 **MS. WEAVER:** I think, Your Honor --

2 **MR. LOESER:** Well, not really. I mean, the topics
3 identify the categories that are indicated in the Court's
4 orders; but then there's this complicated roadmap about what is
5 and isn't going to be testified about.

6 **THE COURT:** That's why I said if you just look at the
7 topics, that covers everything -- right? -- the topics.

8 **MR. LOESER:** Well, I believe that the topics identify
9 the categories that are set forth in the order. So --

10 **THE COURT:** Okay.

11 **MR. LOESER:** -- yes, those are the topics.

12 **THE COURT:** There we are. So that's the guidance.
13 That's what the witness should be prepared to testify to.

14 And as I said, and Facebook said they understand. That
15 Facebook believes something wasn't shared or that the purpose
16 ultimately wouldn't be admissible is not a reason not to answer
17 the question. Right?

18 **MR. LOESER:** Okay. And so we're not --

19 **THE COURT:** It's discovery --

20 **MR. LOESER:** -- doing things --

21 **THE COURT:** -- as to what user was -- what information
22 was collected, what did they do with it, how, why.

23 And then, where that leads to, what the consequence of
24 that is, who knows?

25 **MR. LOESER:** So let me just --

1 **THE COURT:** Great.

2 **MR. LOESER:** Not to beat a dead horse, to use a bad
3 metaphor here, but the -- I'll just read a statement in their
4 letter, and I think that this will provide clarification on
5 what will happen with that.

6 Page 3 of their letter, at the bottom of the page, there's
7 a statement (reading):

8 "Facebook does not intend for its designee to
9 provide details regarding the categories of
10 information it may have received from third parties,
11 except as described below."

12 Well, we're not going to limit our questioning to the
13 narrow scope that this letter seems to suggest the witness will
14 be testifying about.

15 And I think what Your Honor is saying is we're just
16 focused on the main topics; we don't need to worry about the
17 limitations set forth in this letter because the witness will
18 be prepared to testify about the full topic; and it's
19 testimony -- Facebook will not have made the decision not to
20 prepare the witness to testify to this limitation that's set
21 forth in this letter.

22 **THE COURT:** Well, I guess the question is "details."
23 Right? Details, I don't know what that means, "details,"
24 versus sort of categories or things like that. If we're going
25 to go into details about all those, then you're going to run

1 out of time. So -- right?

2 It's sort of a high-level: Genesis of it was, again, that
3 Facebook's representation, after we went through all this
4 briefing about the scope of discovery as to plaintiffs' user
5 information, that they had, in fact, produced all of
6 plaintiffs' user information. So, that is shared.

7 So let's now find out what is it that they collect about
8 users.

9 **MR. LOESER:** Okay. I hear Your Honor.

10 **THE COURT:** Whether it be from a third party, whether
11 it be from their own -- whatever it is. Whatever it is. What
12 is it?

13 And categories. Right? If there's a particular detail,
14 they're not going to be able to go into details about -- I
15 don't know -- which apps or this or that or that. Right? This
16 is just --

17 **MR. LOESER:** No. I hear that.

18 **THE COURT:** -- high level.

19 **MR. LOESER:** And I agree with you.

20 **MS. WEAVER:** Your Honor --

21 **MS. KUTSCHER CLARK:** And, Your Honor --

22 **MR. LOESER:** All I'm talking --

23 **MS. WEAVER:** You're right. Let's get started. We'd
24 love a date, and we will take this deposition according to your
25 direction.

1 And so if Ms. Stein wants to identify who they'll be
2 producing, we're ready, you know, early February to take this
3 deposition.

4 **THE COURT:** Well, I don't know about -- in February.

5 But, Ms. Kutscher Clark, you were trying to say something.

6 **MS. KUTSCHER CLARK:** Oh. I just wanted to assure
7 the Court that the type of language surrounding the type of
8 detail that would be testified to is really intended to zoom in
9 on what's relevant here.

10 The idea was, to the extent the deponent, for instance,
11 testifies that particular data is used only for a security
12 feature, you know, to make sure that there isn't a security
13 breach on the platform, they don't then need to go into detail,
14 for instance, about how that security feature operates.

15 That's all we're intending to convey there. Let's get to
16 the types of data and the types of uses that are actually
17 relevant here, and, of course, we'll provide testimony about
18 that. But if it's clearly outside the scope of what we're
19 talking about in this case, a high-level explanation should be
20 sufficient.

21 **THE COURT:** Okay. I don't think Mr. Loeser disagrees
22 with that.

23 **MR. MONTGOMERY:** Before Your Honor has to leave us,
24 can I just clarify that we're talking about, really, two
25 depositions: one deposition about the monetization and one

1 deposition about data?

2 **THE COURT:** Yeah. I mean, I don't know. It seems
3 like the data would be the longer deposition. Right?

4 **MR. MONTGOMERY:** I think we're anticipating, you know,
5 a full day for each, if that's permissible by the Court.

6 **MS. STEIN:** That sounds -- for, you know, a 30(b)(6)
7 and when -- on two topics, when you often get seven hours for
8 one 30(b)(6), like, we understand these are important topics,
9 but, you know, I think two full days is, you know, a little bit
10 of overkill here. I think, you know, a few hours --

11 **THE COURT:** Ten hours.

12 **MS. STEIN:** -- each for an --

13 **THE COURT:** Ten hours. Ten hours. And I would think
14 that plaintiffs would want most of it to go to the user
15 information. I mean, that -- I mean, seven hours for that
16 I think you could do easily. I don't know. Maybe not. I
17 don't know.

18 Ten hours.

19 **MS. WEAVER:** We will take the deposition, and we will
20 report back.

21 **THE COURT:** But not in -- ten hours over two days,
22 though -- right? -- not one day. Or even more. However you
23 want to do it.

24 Okay. Excellent.

25 **MS. STEIN:** And, Your Honor, just for clarification,

1 you know, I understand that plaintiffs want the identities of
2 these witnesses. I don't know them yet. I don't know who --

3 **THE COURT:** Oh, no, no, no. I understand you don't.
4 No, no. They didn't -- I actually brought that up.

5 I just thought, when you tell them, then that gives them
6 comfort -- right? -- that you're not taking the engineer from
7 wherever. Right? You're actually -- there are people within
8 Facebook who actually know this information -- right? -- that
9 they're high enough up that they have the big picture.

10 **MS. STEIN:** Right.

11 **THE COURT:** So my thinking was that when you share
12 that name, that'll give them some comfort that the person will
13 be -- when you say "be prepared" -- right? -- it's like you
14 can't tell them what -- you can prepare them in the sense of
15 what they should prepare to testify. They're going to have to
16 know or do the gathering to know.

17 **MS. STEIN:** Correct, Your Honor.

18 One thing that I would just appreciate some clarification
19 on. These witnesses are not being deposed in their personal
20 capacity right now. So I just want to make sure that we're not
21 going to be -- you know, by giving them the names in advance,
22 we're not going to be seeing e-mails that these people are
23 being shown and impeached and whatnot; that this is a
24 deposition to get information from them, but not to start a
25 whole cross-examination of them in their personal capacity.

1 **MS. WEAVER:** Deb, we agree with that, except to the
2 extent if it relates to the topic of the deposition, we may
3 introduce -- obviously, we'll be introducing exhibits and if a
4 deponent's name has to be on it.

5 But we agree, not personal capacity. This is a
6 corporate deposition, both of them.

7 **THE COURT:** There may be e-mails. Right? There's
8 documents they reviewed that lead them to believe that there
9 was other user information that was collected about users.
10 Right? So they will probably show the deponent one of those
11 e-mails and say: Well, doesn't this mean this? Right?

12 **MS. STEIN:** Yes, Your Honor.

13 **THE COURT:** That would be the objective.

14 **MS. STEIN:** I normally -- unless someone is also being
15 deposed in their personal capacity, I normally don't share the
16 name of a 30(b)(6) deponent in advance of a deposition. So I
17 just don't want this to sort of get turned into something that
18 is not a 30(b)(6) deposition.

19 **THE COURT:** Okay. It won't. All right? And there'll
20 be a record. So no worries.

21 **MS. WEAVER:** And is Your Honor planning on providing
22 dates for the depositions?

23 **THE COURT:** No. I said it needs to happen by -- in
24 February.

25 **MS. WEAVER:** Okay. Is this a leap year?

(Laughter.)

THE COURT: I don't think so.

MS. WEAVER: I think not.

MS. STEIN: It's an odd year; so I don't think so.

MS. WEAVER: Sorry, Deb. No February 29th.

THE COURT: Okay. I have a change of plea.

Just let me give some guidance as to deposition transcripts or written discovery. I mean, clearly, anything that Facebook has said under oath about relevant topics is relevant. And I would think discovery, unless there's some privilege I'm not aware of -- right? So if they did an interrogatory answer on a relevant topic, that's discoverable.

MS. STEIN: Your Honor, this is a very serious issue for us, especially because this is in the context of government investigations. And we're dealing with government entities who often don't even want us to get the transcript because it's their investigation. So, you know, having this clone discovery issue about what's going on in government investigations is a very significant issue, and respectfully --

THE COURT: Well, that's different than -- that's different than an interview. I thought what was in the letter was depositions.

MS. WEAVER: Your Honor, it's both depositions and the FTC, who has unequivocally stated in this proceeding that they do not object to us receiving information. We have the FTC's

1 written letters that ask for sworn responses to substantive
2 answers.

3 **THE COURT:** So, okay. Let me just, because I'm --

4 **MS. WEAVER:** We just want --

5 **THE COURT:** I'm just giving guidance. I'm not ruling.
6 I'm just giving guidance because it's not ripe and presented to
7 me.

8 My guidance is, for example, if -- it's almost like Jencks
9 material. Right?

10 **MS. WEAVER:** Right.

11 **THE COURT:** If a witness made statements on the
12 topics, if they're going to be a witness in the case, if
13 they're going to be deposed, then I think it's certainly
14 relevant what they said under oath in another case on the same
15 topics. Right? Not if it was unrelated. And the same thing
16 with interrogatory responses. And then I gave a caveat, which
17 is, unless there's some privilege of which I'm not aware.

18 That's all. That's just the guidance that I'm giving.

19 **MS. WEAVER:** Okay. We will bring it before you if we
20 can't resolve it.

21 **THE COURT:** Okay. I guess we need a next date. What
22 is today? Today is the 15th.

23 How about February 24th at 8:30? Maybe you'll have taken
24 that depo, and I'm sure there'll be lots to discuss.

25 (Laughter.)

1 **MS. WEAVER:** That's fine here.

2 **MS. STEIN:** That's fine, Your Honor.

3 **MR. LOESER:** We will all be so knowledgeable by then,
4 Your Honor.

5 (Laughter.)

6 **THE COURT:** It's true. I wish I could take the depo.
7 I would.

8 **MR. LOESER:** You really are invited. We'll send
9 you --

10 **MS. WEAVER:** You know, some judges have done things
11 like that.

12 **THE COURT:** Yeah. I wish I had time, but no time.
13 All right. Thank you very much.

14 **MS. STEIN:** Thank you, Your Honor.

15 **MS. WEAVER:** Thank you, Your Honor.

16 **MR. LOESER:** Thank you, Your Honor.

17 (Proceedings adjourned at 9:05 a.m.)

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CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript
from the record of proceedings in the above-entitled matter.

DATE: Monday, January 18, 2021

A handwritten signature in black ink that reads "Ana Dub". The signature is written in a cursive, flowing style. The first name "Ana" is followed by a space and then the last name "Dub". The signature is positioned above a horizontal line.

Ana Dub, CSR No. 7445, RDR, RMR, CRR, CCRR, CRG, CCG
Official Reporter, U.S. District Court